COMPLIANCE BOARD OPINION NO. 94-1

March 22, 1994

Mr. Arthur S. Miller

In light of the informal conference held on December 16, 1993, the Open Meetings Compliance Board has reconsidered your complaint regarding the meeting of New Carrollton City Council of February 4, 1993. As you know, the Board's original opinion on this matter, dated June 22, 1993, was withdrawn in order to allow interested persons to present information to the Board at the informal conference. The Board also received additional materials after the conference. This opinion, which addresses each of the allegations in your compliant, is a substitute for the previously withdrawn opinion.

I

Notice of the Meeting

The posted public notice for the City Council's February 4 meeting listed a single topic of anticipated discussion: "Discussion of Concerns of Residents Residing in the Good Luck Rd./Leahy Rd. Area." The notice went on to state that "[t]his is a tentative agenda subject to change."

At an open session, the discussion with residents occurred. Then, the City Council held a closed session to discuss certain issues related to the status of a day care facility housed in a city-owned building. The gist of your complaint in this regard is that the notice of the meeting should have advised the public that there might be a closed discussion on this topic.

There is some factual dispute over when the decision to hold a closed session on this topic was made. Mr. Raymond J. Garvey, Chairman of the City Council, stated in his response to your complaint as follows: "Just prior to the [February 4] meeting, I was advised by the City Administrative Officer of a pressing problem dealing with the lessee of the former City Hall, Carrollton Early Learning Center and its owner, Ms. Joan Johnson." Mr. Garvey further states that "the necessity of having a closed meeting that evening was not made until after the close of business on February 4, 1993 and the already posted notice of the workshop meeting. As a result, it was not posted." However, Mrs. Rose Marie Hurdle, a member of the City Council who was not present at the February 4 meeting, wrote to the Compliance Board to indicate that, on February 2, "during a telephone conversation which I initiated with Mr. Garvey to discuss another matter, Mr. Garvey told me he was considering

having a closed meeting to discuss the day care center matter and that he thought Thursday night after meeting with another group of residents would be a good time to do it."

The Open Meetings Act requires that, "before meeting in a closed or open session, a public body shall give reasonable advance notice of the session." §10-506(a). Advance notice is "reasonable" if the public is notified of a future meeting promptly after the public body itself has scheduled the meeting. If a meeting is scheduled on short notice, as sometimes will be required by unexpected developments, the person responsible for the scheduling of the meeting must provide the best public notice feasible under the circumstances. As the Attorney General put it, "[i]f events require the prompt convening of a previously unscheduled meeting, the public body would be well-advised to provide telephone notice to reporters who are reasonably thought to be interested and a written notice should be posted in the customary public place as quickly as possible." Office of the Attorney General, *Open Meetings Act Manual* 15 (1992).

The same principles apply when a public body has already announced that it will hold an open meeting but later determines that it will need to meet in closed session as well. The Act mandates that notice of a session shall, "if appropriate, include a statement that a part or all of a meeting may be conducted in closed session." §10-506(b)(3). The "if appropriate" language is not a grant of discretion to the public body to decide whether to provide notice of a closed session. Rather, the phrase merely indicates that if a public body anticipates that its meeting will be entirely open to public observation, the notice need not contain any reference to a closed session.

The Open Meetings Act does not require any specification of the items to be considered at a meeting. The Act simply requires a notice of the "date, time, and place of the session." §10-506(b)(2). Other law or long-standing practice may cause a public body to provide more detail about the items of business that it intends to conduct, but the Act itself does not impose that requirement.

Whether the New Carrollton City Council complied with the notice requirement of the Act depends on facts that are in dispute. If, as Council Member Hurdle relates, the Chairman of the City Council knew on February 2 that the Council would likely take up the matter of the day center at a closed session on February 4, and if the Chairman or the Mayor had authority under the practice of the City Council to add an item to the agenda at that time, then the Act would have required the City Council to amend its posted public notice to account for the anticipated closed session. If, as Chairman Garvey maintains, the decision to have the closed session was not made until just before the start of February 4 meeting, then no violation occurred. At the informal conference on December 16, both Mr. Garvey and Ms. Hurdle reiterated their separate recollections: Mr. Garvey recalls no such conversation on February 2; Ms. Hurdle reiterated that the conversation did occur on that date.

The Compliance Board was not set up to resolve disputed issues of fact. We have no basis for deciding whose version of events to accept. Under the circumstances, the Board is unable to resolve this aspect of the complaint.[1]

II

Conduct of Closed Session

The central allegation of your complaint is that the City Council held a discussion in closed session that, under §10-505, should have been open to the public. Section 10-505 provides the general rule that, "[e]xcept as otherwise expressly provided ... a public body shall meet in open session."

According to the City Council, the closed session on February 4 was permissibly closed under §10-508(a)(8), which allows a public body to "consult with staff, consultants, or other individuals about pending or potential litigation in closed session." No other justification for closing the session was offered at the time, or subsequently.[2]

The relevant facts are apparently as follows: Carrollton Early Learning Center is a tenant of the former New Carrollton City Hall, owned by the City. On January 13, 1993, Ms. Joan Johnson, the operator of the day care center, was sent a zoning violation notice by a zoning inspector from Prince George's County. The alleged violation was the operation of a day care center in an area zoned for one-family detached residential use. The day care center was told that it must either obtain a special exception or cease this use of the premises. Ms. Johnson was given until February 16, 1993 to appeal the violation notice or request an extension of time.

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[1] Under §10-502.5(f)(2), "[a]n opinion of the board may state that the Board is unable to resolve the complaint."

[2] There is some dispute over whether the events of February 4 are accurately characterized as a single meeting of the City Council with an open portion and a closed portion, or whether the City Council held two meetings, one open and the other closed. For purposes of the Open Meetings Act, this distinction is immaterial.

Two weeks later, on January 26, the City's Administrative Officer, Mr. Lawrence E. Pierce, was advised by the City Attorney, Mr. John R. Foran, that Carrollton Early Learning Center was "responsible for obtaining any and all licenses and anything we do is just a courtesy to them ...." The City Attorney reiterated that the taking of an appeal or request for a special exception was the responsibility of the day care center, "and not the responsibility of the City."

Nevertheless, the Chairman of the City Council reports at least a perception that litigation involving the City was a foreseeable prospect:

> The City Administrative Officer ... had several discussions with Ms. Johnson between January 14 and February 4, 1993 in attempts to resolve the matter. However, Ms. Johnson desired to know what the City's position was on the zoning violation and what we were going to do about it.... She told him she had sought legal counsel and wanted an immediate response as to the City's intentions, given her 30 day decision making window. It was the City Administrative Officer's opinion that this matter was well within the potential for litigation and given the tenant's statements, if no action was taken, this issue would result in a law suit against the City.
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> The purpose of the second meeting [on February 4] was for the administration to advise the City Council as to its actions decided upon to address this potential litigation. The City Administrative Officer stated that as a result of the information at hand, it was evident the tenant would sue for damages and lost income if the business closed within the 30 day zoning notice. Ms. Johnson indicated in a phone call that using her legal counsel would eventually cost approximately $7,000 and maybe even higher. The administration advised that it was going to send a letter to Ms. Johnson as soon as possible committing the City to assisting only in a financial manner up to and not exceeding $3500 on a reimbursable basis towards her costs of applying for and receiving a special exception to continue to operate her business....
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> It was critical that a prompt response be made by the City seeing that the tenant's future ability to recoup such unexpected legal fees was extremely short and the City's failure to participate would have more than likely resulted in a law suit.

In subsequent correspondence from Mr. Foran, the City Attorney, and at the informal conference, several members of the City Council, supported by Mr. Pierce, also indicated that the litigation possibilities to be discussed at the February 4 meeting included the possibility of affirmative litigation by the City against Ms. Johnson for breach of the lease. Mr. Foran also supplied a copy of a letter from Russell W. Shipley, Esquire, counsel for Ms. Johnson, dated August 14, 1993, in which Mr. Shipley indicated his view that Ms. Johnson might have had a valid claim against the City had the zoning problem resulted in the day care center being closed.[3]

In effect, the City Council contends that the discussion resulting in the decision to pay $3,500 of Ms. Johnson's costs in the zoning dispute was a settlement to avert litigation and therefore was permissibly discussed under this exception. The Compliance Board has no doubt that a consideration of settlement options to avert potential litigation is a legitimate basis for invoking the exception. To the extent that the City Council's discussion was thus related to litigation at the February 4 meeting, no violation of the Open Meetings Act occurred.

It is apparent to the Board, however, that the discussion at the February 4 meeting was not confined to the issue of potential litigation, be it a suit against the City or one brought by the City. Two members of the Council confirmed at the informal conference that the February 4 meeting included discussion of the importance of the day care center to New Carrollton and the options that might be pursued if it closed. The options, it was clear, were not solely litigation options. Rather, they included consideration of a change in the site of the day care facility.

Under the circumstances, the Board concludes that, although the exception in §10-508(a)(8) was properly invoked and was applicable to a portion of the closed session on February 4, the City Council violated the Open Meetings Act by discussing matters related to the day care center that went beyond the confines of the exception.

In considering how the "litigation" exception, §10-508(a)(8), applied to this discussion, the Compliance Board gives effect to the interpretative principle specified by the General Assembly: "The exceptions ... shall be strictly construed in favor of open meetings of public bodies." §10-508(c). Strict construction of the "litigation" exception means that a public body may close

[3] Ms. Johnson has succeeded in obtaining extensions of time within in which to seek a special exception, and the day care facility has remained open.

a discussion under §10-508(a)(8) only when the discussion directly relates to the pending or potential litigation; it may not close a portion of the discussion that deals separately with the underlying public issue – here, how to keep a day care center functioning in New Carrollton. To some public officials and others, this distinction may appear artificial and overly rigid. But it is not. Rather, the distinction reflects a core teaching of the Open Meetings Act: A public body must have a clearly defined basis for closing a meeting and must keep its discussion within those confines. Otherwise, "the accountability of government to the citizens of the State" will be undermined. §10-501(b) (statement of legislative policy).

III

Documentation Requirements

The Act requires that, before a public body may meet in closed session, the presiding officer must not only "conduct a recorded vote on the closing of the session" but also "make a *written* statement of the reason for closing the meeting, including a citation of the authority under this section, and a listing of the topics to be discussed." §10-508(d)(2). The Act goes on to provide that "the written statement shall be a matter of public record."

Although the City Council conducted a recorded vote prior to closing the session on February 4, and the presiding officer made an *oral* statement of the reason for closing the meeting, including a citation of the relevant authority, no written statement was prepared, as required by the Act. Therefore, the Compliance Board finds that the City Council violated §10-508(d).

Furthermore, the City Council concedes that it did not comply with §10-509(c)(2), which imposes certain requirements when a public body meets in closed session. That is, the minutes for the next open session of the public body are to include the following:

> (i) A statement of the time, place, and purpose of the closed session;
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> (ii) A record of the vote of each member as to closing the session;
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> (iii) A citation of the authority under the subtitle for closing the session; and
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> (iv) A listing of the topics of discussion, persons present, and each action taken during the session.

The City Council did not present this information in its minutes, as required. Therefore, the Compliance Board finds that the City Council violated §10-509(c)(2).

OPEN MEETINGS COMPLIANCE BOARD

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